SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 73-

HARVEY S. OWEN, individually and doing business as HARVEY'S GUEST HOUSE and JUNE CROWNOVER,

Petitioners,

vs.

JAMES A. MUSICK, in his capacity as Sheriff of the County of Orange, State of California,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

KENNETH PHILIP SCHOLTZ
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PETITION FOR
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STATE OF CALIFORNIA

Petitioners, Harvey S. Owen and June Crownover respectively pray that a Writ of Certiorari be issued to review the final judgment of the Supreme Court of the State of California entered in the above matter on May 1, 1973.

OPINIONS BELOW

The written decision of the California Supreme Court sub nom Crownover v. Musick is reported at 9 Cal.3d___, 107 Cal.Rptr. 681. A copy of the Opinion of the California Supreme Court is set forth in Appendix A. The Opinion of the Court of Appeal for the Fourth Appellate District of the State of California which was vacated by the decision of the California Supreme Court is reported at 18 Cal.App.3d 181, 95 Cal.Rptr. 691. A copy of the Opinion of the Court of Appeal is attached hereto as Appendix B.

The Decision and Opinion of the Superior Court of the State of California for the County of Orange granting a preliminary injunction to petitioners herein is set forth in Appendix C.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. § 1257(3) with respect to the final judgment of the California Supreme Court in Crownover v. Musick, No. L.A. 29917, the decision and opinion of the

California Supreme Court was filed on May 1, 1973 and a Petition for Rehearing and for Stay was denied on May 30, 1973. A copy of the Order denying a rehearing is set forth in Appendix D.

QUESTIONS PRESENTED

1. May a state prohibit nudity on the part of entertainers or performers when the entertainment or performance is not obscene.

2. May a state prohibit the exposure of the genitals, buttocks or breasts of entertainers or performers when the entertainment or performance is not obscene.

3. May a state prohibit the appearance or simulation of the exposure of the genitals, buttocks or breasts of entertainers or performers when the entertainment or performance is not obscene.

4. May a state regulate the attire, costuming or appearance of entertainers and performances without regulating the content of the entertainment or performance.

5. May a state enact regulations of the type approved in California v. LaRue, 409 U.S. 109, which regulate performances protected by the First Amendment, if the regulations are not in the exercise of the state's power to license the sale and consumption of alcoholic beverages under the Twenty-First Amendment.

6. Does an ordinance which prohibits entertainers and performers from exposing their genitalia, buttocks or breasts other than in a theatre or concert hall regulate speech.

7. Is freedom of speech under the First Amendment limited to verbal communication or does it extend to non-verbal communication, through music, dancing, drama and the arts.

8. May an otherwise unconstitutional regulation of speech be justified by being expressed in terms of conduct which is a component part of the speech.

9. Can Orange County Ordinance No. 2356 be justified as a regulation of speech used solely for commercial purposes to promote the sales of food and drink.

10. Should Orange County Ordinance No. 2356 be construed to apply only where the regulated performance or entertainment is offered for the primary purpose of promoting the sale of food or drink or other items of commerce.

11. Is Orange County Ordinance No. 2356 a direct or incidental regulation of speech.

12. If Orange County Ordinance No. 2356 is only an incidental regulation of speech,

a) does it further a substantial or important governmental interest.

b) is it unrelated to the suppression of free expression.

c) is the incidental restriction no greater than is essential to whatever substantial or important interest which might be furthered thereby.

13. Is a substantial or important governmental interest furthered by legislation whose sole purpose is to vindicate the moral opinions of a portion, even a majority, of the population.

14. Is a substantial or important governmental interest furthered by legislation

whose purpose is to prevent tawdry or vulgar entertainment.

15. Is it a denial of equal protection of the laws to permit an entertainer or performer to expose her breasts or his or her genitals or buttocks in a theatre or concert hall while prohibiting the same performance from being presented in a bar, restaurant or other place of public entertainment.

STATUTORY PROVISIONS INVOLVED

1. Section 318.5 of the California Penal Code, which provides as follows:

> "Nothing in this code shall invalidate an ordinance of, or be construed to prohibit the adoption of an ordinance by, a county or city, if such ordinance directly regulates the exposure of the genitals or buttocks of or the breasts of any person who acts as a waiter, waitress, or entertainer, whether or not the owner of the establishment in which the activity is performed employs or pays any compensation to such a person to perform such

activity, in an establishment which serves food, beverages, or food and beverages, including, but not limited to, alcoholic beverages, for consumption on the premises of such establishment.

"The provisions of this section shall not apply to a theatre, concert hall, or similar establishment which is primarily devoted to theatrical performances.

"This section shall be known and may be cited as the Quimby-Walsh Act."

2. Section 318.6 of the California Penal Code, which provides as follows:

"Nothing in this code shall invalidate an ordinance of, or be construed to prohibit the adoption of an ordinance by, a city or county, if such ordinance relates to any live acts, demonstrations, or exhibitions which occur in public places, places open to the public, or places open to public view and involve the exposure of the private parts or buttocks of any participant or the breasts of any female

participant, and if such ordinance prohibits an act or acts which are not expressly authorized or prohibited by this code.

"The provisions of this section shall not apply to a theatre, concert hall, or similar establishment which is primarily devoted to theatrical performances."

3. Ordinance No. 2356[1/] of the County of Orange, California, which provides in pertinent part:

"Section 1. Division 11 is hereby added to Title 3 of the codified ordinances of the County of Orange to read as follows:

DIVISION 11

UNLAWFUL EXPOSURE OF PRIVATE PARTS AND FEMALE BREASTS

Article 1

"Exposure by Waiters, Waitresses and Entertainers.

1/ The ordinance was inadvertantly numbered 2536 in the opinion of California Supreme Court.

"Section 311.011 Prohibitions: Definitions: Waiters, Waitresses, Entertainers.

"Every person is guilty of a misdemeanor who, while acting as a waiter, waitress or entertainer in an establishment which serves food, beverages, or food and beverages, including, but not limited to, alcoholic beverages, for consumption on the premises of such an establishment:

"(a) Exposes his or her genitals, pubic hair, buttocks, natal cleft, perinium, anal region or pubic hair region; or

"(b) Exposes any device, costume or covering which gives the appearance of or simulates the genitals, pubic hair, buttocks, natal cleft, perinium, anal region or pubic hair region; or

"(c) Exposes any portion of the female breast at or below the areola thereof."

"Section 311.012. Counseling or Assisting.

"Every person is guilty of a mis-

demeanor who causes, permits, procures, counsels or assists any person to expose or simulate exposure as prohibited in Section 311.011.

"Section 311.013. Employment or Payment not Necessary for Offense.

"A person shall be deemed to be a waiter, waitress, or entertainer if such person acts in that capacity without regard to whether or not such person is paid any compensation by the management of the establishment in which the activity is performed.

Article 2

"Exposure by Performers in Public

"Section 311.021, Prohibitions: Definitions: Public Performance.

"Every person is guilty of a misdemeanor who, while participating in any live act, demonstration, or exhibition in any public place, place open to the public, or place open to public view:

"(a) Exposes his or her genitals, pubic hair, buttocks, natal cleft, perinium, anal region, or

pubic hair region; or

"(b) Exposes any device, costume or covering which gives the appearance of or simulates the genitals, pubic hair, buttocks, natal cleft, perinium, anal region or pubic hair region; or

"(c) Exposes any portion of the female breast at or below the areola thereof.

"Section 311.022. Counseling or Assisting.

"Every person is guilty of a misdemeanor who causes, permits, procures, counsels or assists any person to expose or simulate exposure as prohibited in Section 311.021.

Article 3

Exemption of Theatrical Establishments

"Section 311.031. Exemption of Theatrical Establishments. The provisions of Article 1 and Article 2 of this division shall not apply to a theatre which is primarily devoted to theatrical performances.

"Section 2. This ordinance is

declared to be an urgency measure necessary for the immediate preservation of the public peace, health and safety, and shall become effective on this date. The facts constituting the emergency are as follows:

> "The California State Legislature has adopted Chapters 1534 and 1535, statutes of 1969,[2/] authorizing counties to adopt legislation of the sort contained herein. Said legislation became effective November 10, 1969. This board finds that the conduct prohibited herein is presently taking place within the unincorporated areas of this county and is so detrimental to the mental and moral state of the people of this county as to justify its immediate prohibition."

2/ Penal Code Sections 318.5 and 318.6, supra

STATEMENT OF THE CASE

Petitioner Harvey S. Owen is the owner of an establishment located in Orange County, California, which serves food and alcoholic beverages and, since 1967, has featured entertainment by topless (bare breasted) dancers. Petitioner, June Crownover has performed as a topless and bottomless (totally nude) dancer in premises located in Orange County

Following the enactment of Ordinance No. 2356 by the County of Orange, petitioners commenced an action in the Orange County Superior Court for declaratory and injunctive relief on the grounds that the ordinance was unconstitutional in a variety of ways. The complaint also attacked the constitutionality of Section 318.5 and 318.6 of the California Penal Code on similar grounds. The grounds alleged in the complaint were that the statutes and ordinance constitute a prior restraint against activity protected and guaranteed by the First and Fourteenth Amendments to the United States Constitution, that the statute and ordinance arbitrarily and unreasonably discriminate against plaintiffs and those

similarly situated as opposed to a theatre, concert hall, or similar establishment which is primarily devoted to theatrical performances, that the terms "theatre, concert hall, or similar establishment which is primarily devoted to theatrical performances" are constitutionally vague, indefinate, uncertain and ambiguous in violation of the Fourteenth Amendment of the Constitution, that the distinction created by the exemption for theatres, concert halls, and similar establishments is unreasonable and without any rational basis in violation of the Fourteenth Amendment.

In support of the complaint and request for preliminary injunction, petitioner Harvey Owen submitted an affidavit which set forth the facts that he was the owner of a premises known as Harvey's Guest House which was then licensed by the Department of Alcoholic Beverage Control of the State of California for the sale of beer for consumption on the premises, that he had presented topless entertainment at Harvey's Guest House since May 1967 (a period of more than two years preceding the filing of the complaint), and that he was the owner

of the real property and business located thereon. The affidavit further stated that petitioner had been informed by the Orange County Sheriff's Department that the Sheriff would make physical arrests of any topless dancers who performed within Orange County in violation of Ordinance No. 2356 and that petitioner himself would be arrested if he were to permit such topless dancers at Harvey's Guest House.

Petitioner Harvey S. Owen recently filed an updated affidavit setting forth his present circumstances in support of a petition for stay order which was presented to Justice Douglas. A copy of his affidavit is attached hereto as Appendix E. The affidavit sets forth that petitioner has continued to present topless entertainment at Harvey's Guest House since the filing of the original complaint herein and that at no time during the approximately 6 years that such entertainment has been presented have any of the dancers employed by him been arrested or prosecuted for being lewd or obscene in the presentation of such entertainment. The affidavit further sets forth that Harveys is now licensed as a

cocktail bar where all alcoholic beverages may be sold and consumed on the premises.

Petitioners' affidavit further sets forth that his presentation of topless entertainment at Harvey's Guest House has in all respects been in compliance with the rules and regulations of the California Department of Alcoholic Beverage Control which were considered by this court in California v. LaRue, 409 U.S. 109, 93 S.Ct. 390 (1972).

A hearing was held in the Orange County Superior Court on December 3, 1969 on petitioner's request for a preliminary injunction prohibiting enforcement of Orange County Ordinance No. 2356. After hearing the court granted a preliminary injunction upon the express grounds that Penal Code Sections 318.5 and 318.6 and Orange County Ordinance No. 2356 violate the equal protection and due process clauses of the United States and California constitutions "in that there is no reasonable, logical, or factual basis for distinction wherein theatres, concert halls, or similar establishments should be excepted from the restrictions imposed by said legislation

while other establishments identical in nature, if not in name or designation, and the persons working therein are made subject to the punishment provided by said legislation." (Appendix C).

Respondent duly filed an appeal from the order granting a preliminary injunction to the Court of Appeal for the Fourth Appellate District for the State of California. On June 18, 1971 the Court of Appeal issued its Opinion affirming the granting of the Preliminary Injunction. In its Opinion, the Appellate Court stated that although the trial court acted on equal protection grounds it felt constrained to review the First Amendment aspect of the case. (Appendix B, page 3). In its Opinion, the court went on to observe that although nudity per se is not protected by the First Amendment, it does come within the protective mantle of the First Amendment when it is part of a method of expression such as a dance or a play. (Appendix B, page 4). The Court of Appeal relied on the California Supreme Court decisions in Barrows v. Municipal Court, 1 Cal.3d 821, 83 Cal.Rptr. 819, and In re

Gianinni, 69 Cal.2d 563, 72 Cal.Rptr. 655 (1968).

The Court of Appeal went on to hold that Ordinance No. 2356 was constitutional as applied to waiters and waitresses but unconstitutional insofar as it applied to nude entertainers. Thus, the Court of Appeal affirmed the order granting a preliminary injunction insofar as it pertained to entertainers and reversed it insofar as it applied to waiters and waitresses. It should be noted, however, that the complaint originally filed by petitioners was filed only on behalf of entertainers and premises featuring entertainers, as opposed to waiters and waitresses.

On or about August 17, 1971 the California Supreme Court granted respondent's petition for hearing, thereby, as a matter of California law, vacating the opinion of the Court of Appeal. The California Supreme Court did not issue its decision until May 1, 1973, when, in a 4 to 2 decision, it upheld the constitutionality of Section 2356 and reversed the order of the Superior Court granting a preliminary injunction.

In summary form, the opinion of the California Supreme Court stated and held that Ordinance No. 2356 was directed at conduct, not words or speech, and did not present the problems raised in obscenity cases. Insofar as persons serving food and beverages are concerned, the ordinances appeared to be a proper exercise of the police power in the area not involving the First Amendment. Insofar as entertainers and performers are concerned, the court held that Ordinance No. 2356 merely proscribes nudity in specified public places. The court said the ordinance does not prohibit entertainment but merely enjoins that the entertainer or performer who offers it must have some clothes on.

The majority opinion went on to assume for the purposes of argument that some communicative element was involved in nude entertainment sufficient to bring into play the First Amendment. It then applied the four-fold test announced in United States v. O'Brien, 391 U.S. 367, and concluded that Ordinance No. 2356 satisfied all four tests.

In reaching its conclusion that Ordinance No. 2356 was valid against a First Amendment attack for overbreadth, the majority opinion held that the United States Supreme Court opinion in California v. LaRue, 409 U.S. 109 was not pertinent because the LaRue opinion only found First Amendment protection with respect to motion pictures and theatrical productions.

Having determined that Ordinance No. 2356 did not involve any activity protected by the First Amendment, the California Supreme Court proceeded to find the exemption for theatres, concert halls, or similar establishments to be proper under traditional Fifth and Fourteenth Amendment standards of due process and equal protection. The majority did not state what decision it would have reached if the ordinance had involved a suspect classification involving speech or some other First Amendment right.

At the conclusion of its Opinion, the majority announced it was overruling In re Gianinni, supra, 69 Cal.2d 563, 72 Cal.Rptr. 655 (1968), cert. denied, insofar as it was inconsistent with the new opinion. As

observed above, Gianinni had been relied upon by the Court of Appeal in its decision affirming the preliminary injunction. The California Supreme Court's majority opinion did not otherwise discuss Gianinni or explain why its conclusions were deemed no longer to be valid.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

I

ORANGE COUNTY ORDINANCE NO. 2356 IS INVALID AS AN ATTEMPT TO REGULATE SEX IN ENTERTAINMENT WITHOUT REGARD TO CONSTITUTIONAL DEFINITIONS OF OBSCENITY

An ordinance which prohibits nudity in public entertainment without regard to whether or not the entertainment is obscene is the equivalent of a statute which prohibits the use of four letter words whether or not such words are used in an obscene context. Since the use of four letter words cannot be prohibited in public expression where the context is not obscene - see Cohen v. California, 403 U.S. 15 (1971); Kois v. Wisconsin, 408 U.S. 299 (1972) - nudity also may not be generally

prohibited in public entertainment and performances without regard to context of the entertainment as a whole.

Ordinance No. 2356 is, by its terms, an attempt to prohibit exposure in public live entertainment without regard to whether or not the entertainment is constitutionally obscene. Under the general scheme of regulation of obscenity in effect in this country since the decision in Roth v. United States, 354 U.S. 476 (1957), it has been clear that speech, including books, movies and live conduct which deal with sex in an obscene matter are not protected by the First Amendment, while all other speech dealing with sex is protected. See Miller v. California, fn.2, ___U.S.___, ___S.Ct.___, (June 21, 1972).

Although this court has recently affirmed the proposition that state regulation of live entertainment may be more restrictive than that of books or movies, such regulation must nevertheless fit within the obscenity framework.

Cf, California v. LaRue, 409 U.S. 109 (1972)

However, in the recent decision of Miller

v. California, supra, this court has made it clear that the greater power of the state to regulate the sexual content of live entertainment does not permit a departure from the general definition of obscenity; instead, the distinction between sex and nudity in books and movies on the one hand, and in live entertainment on the other, is subsumed within the definition of prurient appeal and patent offensiveness.[3/] Miller cited United States v. O'Brien, 391 U.S. 367 (1968) and California v. LaRue, supra. O'Brien of course comes into play only when a regulation of live conduct incidentally effects speech, not when it is directly concerned with the regulation of speech.

Moreover, in the instant case the California Supreme Court has expressly denied that there is any relationship between Orange County Ordinance No. 2356 and the regulation of obscenity. Crownover v.

3/ In fn.8 of the Opinion in Miller v. California, the court stated that " . . . the states have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior."

Musick, 9 Cal.2d ___, 107 Cal.Rptr. at p. 689, Appendix A, p. 8. Such a broad denial does not, however, solve the problem. In Miller v. California, supra, this court required a valid state prohibition of obscenity meet at least the following test:

> ". . . We now confine the permissible scope of such regulation to the works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole do not have serious literary, artistic, political, or scientific value." Miller v. California, supra, ___U.S.___, ___S.Ct.___, at p.___.

Orange County Ordinance No. 2356 fails to meet these requirements. It does specifically define the sexual conduct which may

not be displayed in live entertainment, to wit: the exposure of the female breasts or of the private parts. However, it fails to require that such exposure also appeal to the prurient interest in sex, be portrayed in a patently offensive way, and lack serious literary, artistic, political, or scientific value.[4/]

II

ORANGE COUNTY ORDINANCE NO. 2356 IS INVALID AS AN ATTEMPT TO REGULATE SEX IN NON-OBSCENE ENTERTAINMENT WITHOUT THE SUPPORT OF THE TWENTY-FIRST AMENDMENT

The Orange County ordinance involved in this case also lacks the support of the Twenty-First Amendment which saved the California alcoholic beverage regulations considered by this court in California v. LaRue, 409 U.S. 109. Those regulations were similar to the instant ordinance in that they also prohibited exposure of the

4/ California has a state law which prohibits obscene live conduct in public places; Penal Code Section 311.6.

genitals and anus without regard to whether or not the performance occurred in an obscene context. The court there said:

> "While we agree that at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression, the critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishment which it licenses to sell liquor by the drink."

California v. LaRue, 409 U.S. at ___, 93 S.Ct. at p. 397.

Orange County has not forbidden such performances across the board either, but it has forbidden them in all public places, including those not licensed to sell liquor by the drink. Ordinance No. 2356 does not constitute an exercise of the state's

power to license alcoholic beverages.[5/] Moreover, if the instant ordinance can be justified as a regulation of conduct rather than speech, the same justification would have supported the California Department of Alcoholic Beverage Control regulations without recourse to the Twenty-First Amendment. Such a justification was urged by the state at that time, but not adopted by the court. If such a justification were to be adopted now it would mean that the court had decided an unnecessary constitutional issue in LaRue.

California v. LaRue is applicable to the instant proceedings in another way. Petitioner Harvey Owen holds an Alcoholic Beverage Control license for the sale of liquor to be consumed on the premises. Even though the entertainment presented by him is within the limits of the rules approved in LaRue, he would nevertheless be subject to losing his license by virtue of

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5/ Indeed, it could not. Such power may be exercised only by the State Department of Alcoholic Beverage Control. California Constitution, Article 20, Section 22.

California Department of Alcoholic Beverage Control Rule 143.5 which prohibits any entertainment which violates a local ordinance regulating attire. 4 Cal.Adm. Code § 143.5. In LaRue, the claim that Rule 143.5 was invalid was withdrawn on the principle that local ordinances must be independently challenged. California v. LaRue, 409 U.S. ___, 93 S.Ct. at p. 394, fn. 2. This case is just such an independent challenge of an invalid local ordinance. If the challenge fails, petitioner could f face loss of his Alcoholic Beverage Control license in addition to those criminal penalties imposed by the ordinance itself.

III

AN ORDINANCE WHICH REGULATES THE ATTIRE OF ENTERTAINERS AND PERFORMERS IS A REGULATION OF SPEECH PROTECTED BY THE FIRST AMENDMENT AND NOT MERELY A REGULATION OF CONDUCT

A. Introduction

An essential question raised by the case is the proper characterization of the

ordinances. Petitioners have contended and do contend that Orange County Ordinance No. 2356 is a direct regulation of the attire of entertainers and performers and as such amounts to a prohibition of certain entertainment which would be protected by the First Amendment. By contrast, the California Supreme Court held that the ordinance merely regulates conduct and has no effect whatsoever on speech.

In the following argument we will show (1) that the California Supreme Court has misconstrued Ordinance No. 2356 as being the equivalent of a general prohibition against nudity in public places, when in fact it is an express restriction on the attire of performers and entertainers; (2) based its decision upon the fallacious argument that state regulation of the conduct which constitutes one of the separate components of an act of speech may be regulated or prohibited without regard to its effect upon the communication itself; (3) relied upon the fallacious argument that the freedom of speech named in the First Amendment is limited to the communi-

cation of words or verbal ideas.

B. Ordinance No. 2356 is Not a Prohibition of Nudity in Public Places

In its Opinion the California Supreme Court based its decision upon the erroneous assumption that Ordinance No. 2356 of the County of Orange is a general proscription against nudity in public places. The court said:

> "It is clear that these provisions of the ordinances are directed at conduct - topless and bottomless exposure - and not at speech or at conduct which is 'in essence' speech or 'closely akin to speech'. A commonsence construction (see People v. Davis (1968) 68 Cal.2d 481, 483, 67 Cal.Rptr. 547, 439 P.2d 651) of the pertinent provisions is that they proscribe nudity in specific public places. They do not prohibit entertainment but merely enjoin that if the entertainer or performer offers it, he or she

must have some clothes on. In a word the ordinances regulate conduct."

Crownover v. Musick, 9 Cal.3d___, 107 Cal.Rptr. 681, 694, Appendix A. p. 13.

The California Supreme Court's characterization of the ordinance does not bear analysis. In the first place, Ordinance No. 2356 does not prohibit nudity in express terms nor is it the equivalent of a prohibition of nudity. It does prohibit exposure of certain parts of the body, namely the genitals, buttocks and female breasts. Under the ordinance the exposure of any portion of the female breast below the areola would constitute a violation regardless of whether or not the defendant were otherwise entirely clothed. An entertainer whose neckline plunged too far could be prosecuted even though she could in no way be said to be nude. Similarly, a prosecution under the bottomless portion of the ordinance could be instituted against an entertainer who wore too brief a bikini or pair of hot pants and thus exposed what might be thought a significant portion of

her buttocks. In neither circumstance need the defendant be nude.

Moreover, Ordinance No. 2356 is not limited to actual exposure. It also forbids the wearing of any clothing which simulates or gives the appearance of those portions of the body which may not otherwise be exposed. Indeed, these provisions of the ordinance contained in Sections 311.011(b) and 311.021(b) of Ordinance No. 2356 which prohibit the simulation or appearance or exposure of the forbidden parts give the lie to the characterization of the ordinance as one involving conduct. It is not conduct which is prohibited, but appearance.

Not only is it incorrect to characterize the ordinances as being prohibitions against nudity, it is also incorrect to characterize them as being general proscriptions against the exposure of private parts, buttocks, and breasts in public places. The title of Article 1 of the ordinance shows that it is directed at "exposure by waiters, waitresses and entertainers." By its terms it applies only to a person who is acting as a waiter, waitress or entertainer in an establishment which serves food, beverages, or food and

beverages, including, but not limited to, alcoholic beverages, for consumption on the premises of such an establishment. Petitioners are concerned with the ordinance only insofar as it applies to entertainers. In this regard entertainers are expressly singled out and their appearance expressly regulated. Article 2 of the ordinance is entitled "Exposure by Performers in Public." Section 311.021 is entitled "Prohibitions: Definitions: Public Performance." It is expressly directed at those engaged in public performances by participating in "any live act, demonstration, or exhibition in any public place, place open to the public, or place open to the public view." Thus, it does not proscribe nudity, or the appearance of nudity, or the exposure of the sexual organs, nor the appearance of exposing the sexual organs, on the part of the public in general. It only forbids such exposure by entertainers and persons engaged in public performances.

C. Protected Speech May Not Be Subjected to Improper State Regulation by Breaking it Down Into its Component Parts

The court's conclusion that "the ordinances are directed at conduct, not words or speech" [Crownover v. Musick, 9 Cal.3d ___, 107 Cal.Rptr. 681, 689, Appendix A, p. 8] is based on the false principle that improper governmental regulation of speech may be justified if it is directed at a component part of the speech.

The Fallacy of the argument is pointed out in Justice Tobriner's dissenting opinion, where he said:

> "The message of all the decisions is clear: Except when exercising its extraordinary powers under the Twenty-First Amendment, the state may not ban nonobscene entertainment. But the majority believe they have found a road around this formidable constitutional protection. Entertainment, they assert, can be dichotomized into speech and conduct; the

state need not touch speech, but by barring conduct associated with that speech, the state may effectively proscribe entertainment.

"The adoption of this theory would let the censor loose without constitutional restriction to condemn at will any and all communicative entertainment. While avoiding reference to the actor's speech, the state could ban his gestures, his costuming (or amount of costuming), the positioning of the actors, the lighting of the stage, or whatever other 'conduct' it chooses. Nor is the logic of the majority opinion confined to entertainment in bars or restaurants; it applies equally to the legitimate theatre and to the motion picture. Neither is the logic of the opinion confined to the subject of nudity. If a county seeks to prohibit entertainers, or participants in a public demonstration, from

wearing long hair, fashionable dress, or uniforms (cf. Schact v. United States (1970) 398 U.S. 58, 90 S.Ct. 1555, 26 L.Ed.2d 44), the majority opinion can be construed to uphold such legislation."

Crownover v. Musick, 9 Cal.3d___, 107 Cal.Rptr. 681, 702, Appendix A, p. 21.

Justice Tobriner's comments are not in principle limited to the regulation of entertainment. No form of expression or speech would be free if the speech/conduct dichotomy were to be as loosely applied as it was by the majority opinion. Freedom of speech cannot be exercised without some form of conduct being involved, even if it is nothing more than the mere speaking of words. In our institutionalized, complex society the communication involved in the exercise of freedom of speech and the press normally involves complex conduct by individuals, corporations, and other large business organizations. Surely, however, this Court would not permit

states to abolish the publication of newspapers by prohibiting the operation of printing presses or by enacting regulations prohibiting common carriers from transporting newsprint. Equally, this court would not permit open censorship of newspapers by regulations which might require the operation of a printing press or transportation of news print to rest in the unbridled discretion of a licensing agency. Just as it has with parade permits, the court would have no problem in determining that such matters amount to a regulation, or at least an opportunity to regulate the content of the speech involved.

Returning to the issue directly at hand: to regulate the appearance and attire of actors, dancers and enterainers is to regulate the performance itself. The appearance, staging, costuming (or lack of it) involved in any production is often essential to the impact which it presents. To boldly conclude, as does the majority of the California Supreme Court, that these ordinances "do not prohibit entertainment, but merely enjoin that if the entertainer or performer offers it, he or she must have

some clothes on." (Crownover v. Musick, 9 Cal.3d___, 107 Cal.Rptr. at 694, Appendix A, p. 13) is to allow the broadest form of censorship. It is more correct to say that the ordinance involved here prohibits nudity on the part of the entertainer even when the nudity is an inherent or significant part of the performance.

D. Freedom of Speech is Not Limited to the Communication of Words.

The California Supreme Court's conclusion that Ordinance No. 2356 is not a regulation of speech, and its application of the conduct/speech dichotemy, is based in large measure upon the fallacious conclusion that the First Amendment only applies to the expression of words or symbolic conduct which embodies simple verbal ideas. Much of the performing and visual arts would be placed outside the First Amendment if such a rule were to be followed. The performance of instrumental and orchestral music, the performance of dance and ballet, the performance of pantomine, the exhibition of paintings, sculp-

tures, photographs, and the other visual arts in all their manifold varieties, would be subject to governmental interference unprotected by the First Amendment under the reasoning adopted by the California Supreme Court.

Music is perhaps the most abstract of the arts. Except when wedded to words, as in opera or song, it can seldom be said to express an identifiable verbal idea, yet its power and ability to communicate emotions and feeling is without question. Surely a city ordinance which wholly forbid the playing of musical instruments would be subject to First Amendment scrutiny and could not be justified simply by a statement that musical performance involves conduct rather than speech. Yet that situation is no different from the one presented in the instant case.

Indeed, the majority opinion in Crownover appears to authorize the censorship of every aspect of the performing arts other than the speaking of words. Although the majority finds that the exemption granted to theatres and concert halls is not a violation of equal protection or

due process, it fails to give any consideration to the question of whether such an exception is constitutionally required by the First Amendment. (See dissenting opinion, 9 Cal.3d___, 107 Cal.Rptr. at p. 702, Appendix A, p. 21.) The inherent assumptions of the majority opinion support the conclusion that the exemption would not be a constitutional necessity. If so, the legislature would be free to remove the exemption granted theatres and concert halls, thereby enabling local legislative bodies to expand the ban on exposure to all public performances regardless of location.

In reaching its conclusion that Ordinance No. 2356 is valid, the court asks and answers the wrong question. The court states:

> "Is such conduct symbolic in the constitutional sense? Is this nudity in bars and other specified places open to the public so inherently communicative by nature as to call for the protection given the 'interchange of ideas . . . . [a]ll ideas having even the slight-

est redeeming social importance'
. . ."

Crownover v. Musick, 9 Cal.3d___,
107 Cal.Rptr. at p. 694,
Appendix A, p. 13.

Besides placing an undue emphasis on verbal communication, the court asks the constitutionally wrong question by focusing solely on the inherent as opposed to the possible communicative nature of the acts prohibited. The First Amendment's protection against over-broad statutes applies in any circumstance where the statute or ordinance can be applied to prohibit the exercise of freedom of speech. NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). The issue is not whether all nude performances are inherently communicative but whether any of them are. The question is not whether all nude performances are "tawdry and vulgar," but whether any of them involve a communicative artistry. The court is required under all the existing authority to strike down the ordinance as overbroad if it is capable of being applied in a manner which would impede or restrict the exercise of rights

protected by the First Amendment. This is an issue which the California Supreme Court failed to meet or discuss.

IV

THE INSTANT ORDINANCES CANNOT BE JUSTIFIED AS A REGULATION OF COMMERCIAL SPEECH

Relying in large part upon City of Portland v. Derrington, 253 Or. 289, 451 P.2d 111 (1969), cert. denied, the California Supreme Court determined that nude entertainment is not speech because it is merely a sales device or gimmick.

The court's construction of the ordinance in such a manner is, once again, a misreading of it. Indeed, it is inconsistent to state in one breath that the ordinance is merely a general proscription of nudity in public places and, in the next, to state that the ordinance amounts to a specific regulation of a commercial activity which is "nothing more than a sales gimmick."

We need not question the general principle that speech which has solely a com-

mercial purpose may be appropriately regulated. As Justice Burger has recently pointed out:

> "Neither the First Amendment nor 'free will' precludes States from having 'blue sky' laws to regulate what sellers of securities may write or publish about their ware."
>
> Paris Adult Theatre I v. Slaton, ___U.S.___, ___S.Ct.___ (June 21, 1973).

However, we should point out that there is a difference between speech used as a commercial tool for the sale of other products and speech as an article of commerce itself. Newspapers, motion pictures, and television are all examples of speech which are themselves articles of commerce. The New York Times does not lose First Amendment protection merely because its owners make a profit from its sale. Similarly, where nude entertainment is itself the article of commerce; where it is presented under circumstances where customers come for the purpose of seeing the entertainment and the

sale of food and drink is merely incidental thereto, full First Amendment protection should apply and analogies to Blue Sky Laws are inappropriate.

The problem with applying the Derrington analysis is that,by its terms, the ordinance is not restricted to a regulation of nude entertainment which is merely a device to promote the sale of other products, presumably alcoholic beverages. Section 311.011 of the ordinance is directed to the prohibition of exposure of the private parts and female breasts in places where food and beverages are sold for consumption on the premises and conceivably, this provision of the ordinance could be construed to apply only where such exposure is incidental to the sale of the above named items. However, Section 311.021 applies by its terms to any public performance in any public place even when the performance itself is what attracts the audience. In short, Section 311.021 does not fit the mold of the ordinance which was approved in City of Portland v. Derrington, supra, and as such cannot be supported under the Derrington rationale.

Derrington is distinguishable on another ground. In Derrington the Portland ordinance prohibited the exposure of the female breast in any place where food or alcoholic beverage is offered for sale on the premises. It did not by its terms apply to entertainers as does the ordinance in the instant case. The court held the ordinance constitutional on its face, but did not reach the question of whether it could be constitutionally applied to a dancer or entertainer. By contrast, the ordinance involved in the instant proceedings is expressly and directly written as a restrictive regulation of entertainment.6/

Since the ordinance applied equally to all places where entertainers and per formers expose their breasts and private parts, not merely to those where the enter-

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6/ The California Supreme Court also relied upon Hoffman v. Carson, 250 S.2d 891 (Fla. 1971), cert. denied, in support of its opinion. In Hoffman, the Florida Supreme Court upheld the validity of an ordinance prohibiting nudity in public places by construing it to be an ordinance prohibiting indecent or lewd exposure, not merely nudity itself. It is thus not a valid precedent in this case.

tainment is incidental or a sales device, the justification used by the California Supreme Court is irrelevant and immaterial.

It might have been possible to construe the ordinance to be limited in its application to those places where the nude entertainment is incidental to the sale of other items of commerce. The California Supreme Court could have broadly construed the theatre exemption contained in Section 311.031 to preserve First Amendment rights by limiting the application of the ordinance to places where the entertainment is merely incidental to the business otherwise conducted. Instead, the California Supreme Court failed to treat the theatre exemption as being required by the First Amendment and failed also to broadly construe it. In the companion case, Glancy v. Sacramento, decided at the same time and in the same opinion, the California Supreme Court approved a theatre exemption which contained a restrictive definition of what a theatre was. That definition provided that:

> ". . . theatre, concert hall, or other similar establishment which is primarily devoted to theatrical per-

formances shall mean a building, playhouse, room, hall or other place having permanently affixed seats so arranged that a body of spectators can have an unobstructed view of the stage, upon which theatrical or vaudeville performances or similar forms of artistic expression are presented, and where such performances are not incidental to the promoting of the sale of food, drink or other merchandise, and for which a city license for a theatre is in full force and effect. . . ."

Crownover v. Musick, 9 Cal.3d___, 107 Cal.Rptr. at p. 687, fn.9, Appendix A, p. 6.

This definition is clearly restrictive in that it requires fixed seats, an unobstructed view of the stage from such seats, and the possession of a city theatre license. cf., Schact v. United States, 398 U.S. 58 (1970). It would preclude the exemption from being applied to many places where the performance is the principle offering of the premises, merely because

the premises lack a stage, fixed seats or, for whatever reason, a theatre permit. Such a narrow definition extends the ordinance's application beyond those premises where the entertainment is simply offered as a sales promotion device.

Although the Orange County ordinance involved in the instant case does not have a definition of what a theatre, concert hall, or similar establishment is, the court has clearly failed to construe such terms in the manner necessary to preserve the First Amendment rights of all places of public entertainment.

V.

ORANGE COUNTY ORDINANCE NO. 2356 IS NOT A VALID INCIDENTAL REGULATION OF SPEECH WITHIN THE TESTS SET FORTH IN UNITED STATES V. O'BRIEN

In the majority opinion of the California Supreme Court, the court assumed for the purposes of argument that Ordinance No. 2356 would have incidental impact on speech, and proceeded to apply the four

tests set forth in United States v. O'Brien. After doing so, the court found the ordinance still to be valid. We shall show that the court incorrectly applied those tests and that the ordinance cannot be sustained as a valid incidental regulation of speech.

In United States v. O'Brien, supra, the court set forth the test as follows:

> ". . . This court has held that when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a governmental regulation is sufficiently justified if it is within the con-

stitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

United States v. O'Brien,
391 U.S. 367, 376-377.

As a prerequisite, then, the application of the O'Brien test demands a situation where a governmental regulation of conduct is applied to a situation where elements of speech and the regulated conduct are combined in the same acts. If such a prerequisite is met, the regulation of conduct will justify an incidental limitation on the exercise of the speech if the four tests are satisfied.

In grudgingly applying the O'Brien tests, the California Supreme Court said:

". . . We shall assume for the purpose of argument that there may

be some instances a 'Communicative element' in conduct falling within the instant ordinances sufficient to bring into play the First Amendment."

Crownover v. Musick, 9 Cal.3d___, 107 Cal.Rptr. at p. 695, Appendix A, p. 14.

It is clear, however, that such a combination will often occur in situations subjected to regulation under Ordinance No. 2356. That ordinance applies to all entertainment and public performances conducted in Orange County outside of theatres, concert halls, or similar establishments. It will apply to any play, ballet, or other public entertainment conducted outset the said locations and will, if valid, require the performers to be dressed in accordance with the provisions of the ordinance. Such a play, ballet, or other entertainment is of course conduct which, in most, if not all cases, will amount to speech within the meaning of the First Amendment. Thus, the applicability of the O'Brien test may not merely be assumed for the purposes of argument. It is a neces-

sary inquiry which is essential to the disposition of the case.

Applying O'Brien, the first question which must be answered is whether Ordinance No. 2356 is within the constitutional power of Orange County to enact. In affirming the existence of such power, the California Supreme Court characterized the ordinance as being a regulation of nudity in public. So characterized, the ordinance might be within the county's traditional police power. However, as we have observed above, the ordinance does not prohibit nudity but instead regulates the dress and attire of entertainers and performers. As such it is subject to different standards. As we have observed above, a regulation directed to the sexual nature of the entertainment cannot stand unless it fits the definition of obscenity. If that is indeed the case, then the instant ordinance does not come within the constitutional power of Orange County, since it fails to incorporate the constitutional definition of obscenity.

The second test is whether or not the regulation furthers an important or sub-

stantial governmental interest. For the purposes of this argument we shall assume that Orange County Ordinance No. 2356 may be properly characterized as a general prohibition of nudity in public places raising only the question of whether it may be incidentally applied to performers and entertainers. The majority's justification of the ordinance under this second test was as follows:

> "Second, it cannot be gainsaid that the regulations further 'an important or substantial governmental interest' (citation) in promoting public morals. It is our province to take note of public morality, not to dictate it. In this pluralistic society we cannot say that a 'topless' female or a 'bottomless' or nude person of either sex in a public place or place open to the public is 'socially commonplace' (citation) or has the support of a 'societal concensus' (citation). Indeed, the instant legislation conceivably gives some indication that such nude conduct is not in accord

with the mores of the people as a whole."

Crownover v. Musick, 9 Cal.3d___
107 Cal.Rptr. at pp. 695-696,
Appendix A, pp. 14-15.

The majority opinion fails to identify the governmental interests which are furthered by the ordinance. The only interests which may be inferred are the presumed interests of the government in prohibiting that which is not socially commonplace or which lacks a societal consensus. We would respectfully urge, to the contrary, that government in a pluralistic society has no business using the criminal law to enforce standards of morality which differ from individual to individual. Nor can such legislation be approved by the boot strap method used by the court: Its existence does not prove that it is needed.

Under the second O'Brien test, incidental restrictions on speech cannot be justified by just any exercise of the police power. The interest must be important or substantial. If these limitations are ignored, the O'Brien test would be reduced to nothing more than an application of

traditional due process analysis. The mere existence of a moral consensus opposed to topless entertainment would not satisfy these requirements.

The third test is whether or not the regulation is unrelated to the suppression of free expression. The majority opinion of the California Supreme Court so concluded on the theory it was aimed at conduct not at speech. We have already shown the invalidity of the court's reason as applied to Orange County Ordinance 2356, which is expressly directed at entertainment and at the attire and appearance of performers. Such a conclusion could be justified only on the assumption that the ordinance amounted to a general proscription of nudity - an assumption which we have already established to be inapplicable in this case.

The fourth test is whether the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. The majority concluded that it was not because the ordinances do not prohibit speech or expression. This amounts to a denial of

the fact that the ordinances do have an incidental effect on speech and expression protected by the First Amendment, the very assumption on which the court proceeded. The majority's justification is no justification at all. As we have alredy observed there will inevitably be numerous circumstances where the presentation of plays, ballets and other public entertainments are affected by the application of this ordinance. This is, by definition, an incidental restriction on speech. The majority opinion failed totally to face the question of whether the restriction was greater than necessary.

The ordinances involved here are far broader than necessary to further any substantial governmental interest involved. In supporting this point we can do no better than quote the dissenting opinion of Justice Tobriner:

> "The <u>fourth test</u> is that the law impose <u>no greater restriction than is essential</u> to the furtherance of an important or substantial governmental interest. This test requires us to identify the governmental in-

terest in question. If it is to prohibit nude entertainment, then the ordinances go further than necessary in banning the simulation of nudity; if it is to avoid neighborhood blight, they go further than needed in banning such entertainment regardless of location; if it is to eliminate the tawdry and vulgar, they go too far in banning all nude entertainment of whatever sophistication or refinement. Nowhere in the majority opinion can I discern a state interest which so closely parallels the ordinances that they could be said to proscribe no more than is necessary to further that interest.

"If compelled to describe the state's interest in regulating nude entertainment before voluntary adult audiences, I would be constrained to use antonyms of the terms set out in O'Brien; I would describe that interest as 'noncompelling', 'unimportant', 'insignificant', and 'dubious'. I would conclude that such

an interest does not justify any restriction upon protected expression."

Crownover v. Musick, 9 Cal.3d___, 107 Cal.Rptr. at p. 707, Appendix A, p. 26.

For these reasons the instant Orange County ordinance fails to meet the tests of United States v. O'Brien and it must be held unconstitutional.

VI

THE EXEMPTION GRANTED THEATRES, CONCERT HALLS, AND SIMILAR ESTABLISHMENTS IN ORDINANCE NO. 2356 DENIES PETITIONERS THE EQUAL PROTECTION OF THE LAWS.

Although treated by the California Supreme Court as a general prohibition on nudity in public places, Ordinance No. 2356 does contain an exemption for performances given in theatres, concert halls, and similar establishments primarily devoted to theatrical performances. Petitioner Harvey Owen presents topless enter-

tainment in a bar licensed by the California Department of Alcoholic Beverage Control to sell liquor for consumption on the premises. We assume for the purposes of this argument that such premises do not fall within the theatre exemption.

We stress at the outset that under the California Supreme Court's majority opinion, the existence of the exemption is irrelevant to First Amendment issues. The underpinning of the majority opinion is that the First Amendment does not protect nudity in entertainment. Thus, the exemption granted to performances which take place in theatres, concert halls, and similar establishments does not embody any requirement that First Amendment protection be accorded such performances in such places. As indicated above, the court's approval of the restrictive definition of a theatre contained in the Sacramento ordinance indicates conclusively that the court does not conceive of the theatre exemption as embodying any First Amendment protections.

The California Supreme Court majority applied traditional Fourteenth Amendment tests of equal protection in sustaining the

theatre exemption against constitutional attack. It refused to apply the "suspect classification" test on the theory that First Amendment values were not impinged by the instant ordinance. However, such a conclusion is unjustified for the same reasons as we have already indicated in discussing the application of the O'Brien tests. Not only is the ordinance directed at speech on its face, but it is clear that it is generally applicable to the regulation of theatrical performances undertaken outside exempt locations.

The "compelling public purpose" test used to evaluate classifications of matters protected by the First Amendment is essentially equivalent to the tests set forth in United States v. O'Brien to evaluate incidental regulations of such matters. See Shapiro v. Thompson, 394 U.S. 618 (1969). The existence of theatrical productions which involve nudity or the exposure of the lower portion of the female breast in circumstances where such productions would be protected by the First Amendment is unquestionable. For a local government to rule that such performances

must take place only in edifices denominated a theatre or concert hall, or in other establishments which are regularly devoted to theatrical performances is to invidiously discriminate against those locations where theatrical performances are given only occasionally and against those locations which do not fit within the generic classification of theatre or concert hall. Such a classification is surely suspect since it arbitrarily fixes the locations where First Amendment rights may be exercised.

We can readily conceive that government has some right to control the location of theatrical productions involving nudity; it would appear to be unquestionable that government may prohibit such performances from taking place in public parks or on public streets. If the theatre exemption were to be broadly construed to permit nudity in non-obscene performances presented in enclosed premises it would serve rather than restrict First Amendment values. However, to permit the presentation of a performance protected by the First Amendment in a theatre

and to prohibit the same performance in a bar or other place open to the public merely because nudity is involved is to make an invidious discrimination that has not and cannot be justified by any compelling public purpose.

CONCLUSION

For the reasons stated herein, a Writ of Certiorari should issue.

Respectfully submitted,

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